Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI; EXHIBIT A

PARTINGTON AND FOLEY
EARLE A. PARTINGTON
2450 PACIFIC TOWER
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HONOLULU, HAWAII 96813
(808) 526-9500

Petitioner pro se

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In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a case involving the sixth amendment right-to-counsel clause, the Supreme Court stated that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. The burden of proof in establishing a valid waiver of the right to counsel falls upon the person claiming the waiver. Michigan v. Jackson, 475 U.S. 625, 633 (1986). The presumption against waiver applies to the attorney-client privilege, which is part of the sixth amendment right-to-counsel clause.

Respondents' suggestion of mootness rests entirely upon the validity of the purported attorney-client privilege signed by Partington's former client in State v. Clarke, Clifford M. M.

Clarke, Sr., on April 20, 1990. On May 29, 1990, subsequent to the filing of Petitioner's Motion to Strike Suggestion of Mootness and Respondent's Supplemental Memorandum and Memorandum in Opposition to Motion to Strike Suggestion of Mootness, Clarke, through his independent court-appointed counsel, filed a "Motion to Declare Waiver of Lawyer-Client Privilege Invalid and to Suppress Disclosures and for Remand for Hearing on Motion to Declare Waiver of Lawyer-Client Privilege Invalid and to Suppress Disclosures" in the Hawaii Supreme Court. A certified copy of Clarke's including his supporting affidavit, is appended as Exhibit A hereto. The motion is based on Clarke's assertion that he was advised by his prior court-appointed counsel, in the presence of HSCR 13 prosecutor Bennett (successor to respondent Chang), to waive the privilege, but was not afforded full disclosure prior thereto. Upon full disclosure of the consequences of such a waiver, Clarke asserts that he does not wish to waive the privilege and that if he had had full disclosure prior to the April 20, 1990, waiver, he would not have signed the waiver.

DATED: Honolulu, Hawaii, June 5, 1990.

EARLE A. PARTINGTON,
Petitioner pro se

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

FILED
1990 MAY 29 P 3:31
CLERK SUPREME COURT

MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES AND FOR REMAND FOR HEARING ON MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES

AFFIDAVIT OF PAUL T. MURAKAMI

AFFIDAVIT OF CLIFFORD M. M. CLARKE, SR.

PAUL T. MURAKAMI
Suite 716, Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
Tel. No. 531-6656

Attorney for Defendant-Appellant

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the State of Hawaii.

Dated, at Honolulu, Hawaii, June 5 A.D. 1990

Sandra N. Yasui
Clerk, Supreme Court, State of Hawaii

EXHIBIT A

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES AND FOR REMAND FOR HEARING ON MOTION TO DECLARE WAIVER OF LAWYER-CLIENT PRIVILEGE INVALID AND TO SUPPRESS DISCLOSURES

Defendant-Appellant CLIFFORD M. M. CLARKE, SR., by and through his court-appointed attorney PAUL T. MURAKAMI, hereby moves for an order declaring the waiver of lawyer-client privilege filed in this proceeding on April 23, 1990, to be invalid, and to suppress disclosures made pursuant to said purported waiver. Defendant-Appellant moves that this matter be remanded to Circuit Court for an evidentiary hearing on this motion. This motion is based on the attached affidavits and the file in this case.

DATED: Honolulu, Hawaii, May 29, 1990.

Paul T. Murakami

PAUL T. MURAKAMI
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

AFFIDAVIT OF PAUL T. MURAKAMI

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

PAUL T. MURAKAMI, being first duly sworn upon oath, deposes and says:

That he is personally familiar with the facts stated herein.

That he has been appointed by Judge Huddy, Administrative Judge of the Criminal Division, First Circuit Court, to represent Defendant-Appellant "for the limited purpose of consulting with Defendant as to whether or not he should waive his attorney-client privilege in the Rule 13 proceeding (S. Ct. No. 10041) associated with this case [Cr. No. 59285]."

That Affiant's "appointment includes the taking of any actions he feels necessary in this Court [Circuit

Court], in the Supreme Court of Hawaii or in any other court in connection with his consultation with Defendant for the protections of Defendant's interests."

That Affiant was appointed by Judge Huddy based on the motion made by Defendant-Appellant's Family Court attorney, SAMUEL P. KING, JR., who was concerned that Defendant-Appellant had not been fully advised about the consequences of waiving his attorney-client privilege.

That Affiant consulted with Defendant-Appellant personally at Kulani Correctional Facility on the island of Hawaii and by phone several times.

That Affiant learned in his first meeting with Defendant-Appellant that he had purportedly waived his attorney-client privilege at the suggestion of his criminal defense attorney, CHRITOPHER R. EVANS, without having been informed by Mr. Evans as to what Mr. Partington might say if the privilege were waived, and that Affaint believed that this was inappropriate since DR 4-101(C)(1) requires a "full disclosure" to a client before obtaining consent of a client validly to waive the attorney-client privilege.

That in order to obtain sufficient information to make a "full disclosure" to Defendant-Appellant about the effect of his waiving his attorney-client privilege, Affiant obtained the permission of Defendant-Appellant

to talk to Mr. Partington to find out what Mr. Partington whould say if the privilege were waived.

That Affiant talked to Mr. Partington and was informed what he would say if the privilege were waived and Affiant reported this information back to Defendant-Appellant.

That upon consultation with Defendant-Appellant after "full disclosure" to him about all of the ramifications of waiving his attorney-client privilege, Defendant-Appellant has decided that, now that he has "full disclosure," he does not want to waive his attorney-client privilege in this matter and that he wants to have his previously filed waiver declared invalid.

That Defendant-Appellant feels that he did not obtain "full disclosure" when he purportedly waived his privilege and that if he had obtained "full disclosure" when the issue of waiver was first presented to him, he would not have purported to waive his privilege.

That based on what Affiant has learned from Mr. Partington, Mr. King and the file in this case, Affiant agrees with Defendant-Appellant that he did not receive proper "full disclosure" when he first waived his attorney-client privilege, and that Defendant-Appellant's remedy is now to move in this Court to have his purported waiver declared invalid and his statement taken

thereunder suppressed following an evidentiary hearing in Circuit Court.

That Affiant believes that a remand to Circuit Court for an evidentiary hearing on the issues involved is necessary because this Court does not hold evidentiary hearings.

That Affiant believes that it is in Defendant-Appellant's best interests that his purported waiver be declared invalid and that all disclosures made by Defendant-Appellant thereunder be suppressed and that these remedies are mandated by the fact that Defendant-Appellant filed his purported waiver and made his disclosures without having been fully and competently advised of the effect of his purported waiver and disclosures.

Further Affiant sayeth naught.

Paul T. Murakami
PAUL T. MURAKAMI

Subscribed and sworn before me on this
29th day of May, 1990.

Bobbie J. Hayes
Notary Public, State of Hawaii

My commission expires: 8/4/92

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	Cr. No. 59285
In re EARLE A. PARTINGTON	

AFFIDAVIT OF CLIFFORD M. M. CLARKE, SR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

CLIFFORD M. M. CLARKE, SR., being first duly sworn upon oath, deposes and says:

That he is personally familiar with the facts stated herein.

That he is the Defendant-Appellant in the above case.

That on April 20, 1990, Affiant was approached by his criminal defense attorney, Christopher Evans, and Mark Bennett, whom he did not know and had never met and was introduced to him by Mr. Evans.

That on April 20, 1990, in the presence of Mr. Bennett, Mr. Evans advised Affiant to waive his attorney-client privilege as to all communications between

him and attorney Earle A. Partington who represented Affiant is his first trial and appeal.

That when Mr. Evans advised me to waive my privilege, Affiant did not know what Mr. Partington would say if Affiant's privilege were waived, and neither did Mr. Evans as Affiant has never authorized Mr. Partington to tell Mr. Evans what Mr. Partington would say and Mr. Evans has never asked Affiant to authorize Mr. Partington to tell Mr. Evans what Mr. Partington would say.

That Mr. Evans informed Affiant that it was in his best interests to waive his privilege as to Mr. Partington, and that by waiving the privilege, Affiant would be able to stay out of the Rule 13 proceeding involving Mr. Partington.

That it has always been Affiant's desire to have no involvement in this Rule 13 proceeding, and that Affiant has always told Mr. Partington and Mr. Evans this.

That based upon Mr. Evans' representations that it would be in Affiant's best interests to waive the privilege and that Affiant would not be further involved in this proceeding, and only for these reasons, Affiant signed the waiver that Mr. Evans had brought with him and spoke to Mr. Evans and Mr. Bennett about my first trial, including my commnications with Earle A. Partington.

That upon being advised by Affiant's Family Court attorney, Samuel P. King, Jr., that he had serious questions about the advisability of waiving the privilege, Affiant authorized Earle A. Partington to reveal to Mr. King what Mr. Partington would say if the attorney-client privilege were waived.

That after Mr. King spoke to Mr. Partington and reported back to Affiant, Affiant became concerned about the advisability of waiving his privilege and asked that an independent attorney be appointed to advise him in this matter.

That after Paul T. Murakami was appointed to advise Affiant in this matter, Affiant authorized Earle A. Partington to reveal to Paul Murakamai what Mr. Partington would say if Affiant waived the attorney-client privilege..

That after being advised by both Mr. King and Mr. Murakami, Affiant believes that it is not now nor has it ever been in his interest to waive his attorney-client privilege and that had he known on April 20, 1990, what Mr. Partington would say, and that a waiver of the privilege would involve Affiant in the Rule 13 proceeding against his wishes, he never would have signed the purported waiver.

That Affiant has read the motion and affidavit filed herewith and is in full support of Mr. Murakami's efforts to assist him in asserting his attorney-client privilege.

Further Affiant sayeth naught.

Clifford M. M. Clarke Sr.
Clifford M. M. Clarke Sr.
CLIFFORD M. M. CLARKE, SR.

Subscribed and sworn before me on this
25th day of May, 1990.

Mary Virginia Davis
Notary Public, State of Hawaii

My commission expires: 03/24/91

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered or mailed to following persons as specified on May 29, 1990:

JOSPEH M. GEDAN
3703 Round Top Drive
Honolulu, Hawaii 96822

MARK BENNETT
McCorriston, Miho & Miller
500 Ala Moana, Suite 400
Honolulu, Hawaii 96813

EARLE A. PARTINGTON
Pacific Tower, Suite 2450
1001 Bishop Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, May 29, 1990.

Paul T. Murakami

PAUL T. MURAKAMI
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following person(s) on June 5, 1990, to the address below by:

(X) HAND-DELIVER

( ) MAIL

TO: STEVEN S. MICHAELS
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Attorney for Defendants

JOHN ASHFORD THOMPSON
Suite 600
810 Richards Street
Honolulu, Hawaii 96813

Attorney for Amicus Curiae Hawaii
Association of Criminal Defense Lawyers

EARLE A. PARTINGTON